Court of Appeals No. 42524-6-II

Lewis County No. 11-2-00574

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN J. HADALLER

Appellant

v.

DAVID A. and SHERRY LOWE, individually

and the marital community thereof;

and RANDY FUCHS, An individual;

Defendants

APPELLANT'S REPLY BRIEF

John J. Hadaller

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pm 6/27/12

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[1] Hadaller intended to Cite Strong in his opening brief instead of the inadvertent error citing an unreported case which cited to Strong. Strong was cited in the ttrial court Response to Summary Judgment.(CP187 L. 21)

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Reply To Lowes Issues On Appeal

Hadaller does assign error to the trial Court awarding fees and sanctions under CR11 and RCW 4.84.185.

Hadaller's claims of emotional distress were dismissed but were not void of merit before summary judgment causing little or no time or effort to answer to, *Maloney v. Home & Inv. Ctr., Inc., 2000* MT 34, 298 Mont. 213, @ 231, 994 P.2d 1124, @1136

Reply To Lowes Statement Of Facts.

The sale of lot 2 from Fortman to the Lowes occurred by Fortman signing the deed on May 13, 2008. (CP 131,132)

The Lowes, self serving, unproven statement they bought lot 2 for their family getaway is contrary to the indisputable facts. The indisputable facts show Lowe stealthily took great legal risk and effort to take over control of the homeowners association, (HOA) became the president, and the HOA attorney and illegally recorded and then pled to the Court for and obtained a twelve residence easement, by misrepresentation, when they already owned a single family easement access to lot 2 and to their 3 other lots.. (CP 884 L1-7) (CP 919 ¶7) (CP 482)

Hadaller's May 7, 2008 offer was equitable . (CP 113¶35-114) (494-499) (CP 133-137)

The May 8, 2008 e-mails (CP 500- 503) do not support Lowe's assertion that Hadaller acknowledged there was no agreement. They specifically acknowledge the ongoing discussions of the proposed agreement and Lowes misrepresentation they would come walk the property and finalize an equitable agreement .(CP 505) (CP 133 --137)

The Lowes statement they did not agree to agree is inconsistent with the evidence shown (CP 499 ¶3) (CP 505) (507) where Lowe acknowledges the agreement he misrepresented to get Hadaller to not enjoin the sale.

Reply To Lowes Procedural Background

Hadaller relied upon the standing of the 2006 Amended Covenant document to prevent the Lowes from obtaining use of the road and accepting the Lowes purchase as a single family property with its original easement. When the Court Dismissed Hadaller's claim for declaratory judgment of that issue in December 2010 Hadaller immediately moved for joinder of the Lowes and these claims into the Fortman suit December 8, 2010 and again in March of 2011 in Suit No. 09-2-00934-0 before filing the complaint in this suit May 13, 2011.

The Lowes and Fuchs claims are pled separately in the complaint. Misrepresentation is claimed as a cause and claim for relief against the Lowes. (CP 17 ¶4.1) (CP 20 ¶5.1)

No discovery had been afforded before the Lowes swiftly filed for summary judgment, shortly after answering to the complaint. Hadaller asserts the evidence available demonstrates sufficient elements of the claims supporting denial of summary judgment.

Reply To The Lowe's Argument

Statute of limitations had not ran, David and Sherry Lowe's (Lowe) Response Brief attempts to obfuscate the facts and argument. Hadaller's claim to rescind the sale of lot 2 from Fortman to the Lowe's, to provide Hadaller an opportunity to enjoin it or alternately for specific performance to perform their proposed agreement (CP 114 L. 10-21)(CP 133-137), is based upon Lowes misrepresentation of his proposal to mutually agree to a property purchase and equitable division as part of the course of that sale. The proposed agreement that Lowe claimed was forthcoming when his wife was well enough to walk the property to place her input into it, became a misrepresentation. (CP 499 ¶3,4) (CP 505) (CP507 ¶ 6) (CP 114¶36- CP 116 ¶ 43) The finding and obvious existence of misrepresentation is not only part and partial of the interference claim but is a tort claim that is

present and was pled, for relief from, in the complaint. (CP 3&17 ¶4.1) (CP20 ¶5.1)

Because of the expectation and good faith reliance of that pending agreement, the claim for misrepresentation, which is partial to interference, had not accrued until a time after the Lowes did not fulfill their proposed visit (CP499¶3)(CP 505 ¶4) to further the proposed details sufficiently, to place them into a legal writing. As had been proposed in their phone discussions, which Hadaller penciled out to begin draft of the formal agreement proposed. (CP 114 L. 10-21)(CP 133-137)

On the Fourth of July weekend, 2008, the Lowes furthered their disclosure of their possible misrepresentations. (CP116 ¶40.41) If the claim had accrued at that time, the statute had not ran when the summons was filed on May 13, 2011 either. Whether a party exercised due diligence is normally a factual issue, which usually precludes granting summary judgment. *Clare v. Saberhagen Holdings, Inc.*, 129 Wash. App. 599, @ 603, 123 P.3d 465, 467 (2005)

Although Lowe cites *Clare,* that case does not support the Lowe's argument, rather it does confirm summary judgment should have been denied. Clare and this case are based upon facts distinguishably different. Clare was definitely and clearly informed

of the cause for action by doctors records identifying the cause for his illness more than what the time the statute would allow before the summons was filed. In fact the Court held had the cause of Clares illness not been so definite the claim would have avoided summary judgment. *I.d* at 603 In this case there exists a genuine issue of the very material fact of whether the e-mails passed between Lowe and Hadaller in early May 2008, amount to either an ongoing plan to avoid Hadaller's enjoinder of the sale, being material to fraudulent misrepresentation, or an agreement developing which subsequently went awry, being material to negligent or innocent misrepresentation, or some other multiple possibilities all supporting a claim of misrepresentation of one degree or another sufficient to rescind and enjoin the sale of lot 2.

The statute of limitation for a damage action based on common law fraud does not commence to run until the aggrieved party discovers, or should have discovered, the fact of fraud by due diligence and sustains some actual damage as a result therefrom. This interpretation prevents the unconscionable result of barring an aggrieved party's right to recovery before a right to judicial relief even arises. It is also based on the principle that it is both illogical and unjust to require a party to file a lawsuit in anticipation of damages merely because the potential plaintiff knows of the

fraudulent acts of another. *First Maryland Leasecorp v. Rothstein*, 72 Wash. App. 278, 283-84, 864 P.2d 17, 20 (1993)

In summary judgment the facts must be construed in Hadaller's favor, if reasonable persons might reach different conclusions, the motion should be denied. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash. 2d 255, @ 256-57, 616 P.2d 644, 645 (1980) The conclusion of the issue of whether Lowe misrepresented his May 2008 stated agreement is one for a jury to decide.

Alternately, The Courts finding the statute accrued on May 9, 2008 (RP 17 L19) is in error because no sale had even occurred for Hadaller to know about. Any statement the sale had closed was false. The sale of lot 2 had not closed and there still existed no definite sale until May 13, 2008. (CP 505) That fact is proven by the notarized signature of William Fortman dated 5/13/08 (RCW 64.04.010) and the recording date of 5/14/08 (CP 132, 131) Accordingly, in worst case argument the summons was served May 12, 2011, filed May 13, 2011 (CP 1) CP 471,472) three years to the day lot 2 was sold by Fortman, RCW 64.05.010, RCW 64.04.030 and one day less than the day the Court deems the claim would accrue, if not for the elements of misrepresentation not accruing until later. When instrument involving real property is recorded it becomes notice to all the world of its contents. *Strong*

v. Clark[1], 56 Wash. 2d 230, 352 P.2d 183 (1960) Even though Lowe indicated on May 8, 2008 the sale had occurred it had not until May 13, 2008,.That was more misrepresentation by Lowe, thus it was impossible for the claim to accrue legally until it was recorded on May 14, 2008. Accordingly, the claim could not legally accrue before the sale of lot 2, which was not more than three years before the summons was filed and served. RCW 16.080 (4) RCW 4.16.170

Lowes Assertion Hadaller Did Not Plead Misrepresentation Has No Merit. Hadaller pled a claim for misrepresentation. The Lowes failed to move for summary judgment on Hadaller's claim of misrepresentation (CP 713), The Court did not rule specifically on misrepresentation however the Court used a catch all determination, **Erroniously**, by finding "There was no improper purpose" (RP7/29/11 Pg18 L.18) which improperly dismissed an element, that is at issue, of material fact . That is the Lowes misrepresentation which stemmed from how and what the oral discussions occurring in early May 2008, regarding the sale and non joinder of that sale of lot 2, amounted to a genuine issue of material fact which is for the finder of fact to determine. Or the Court did not rule on misrepresentation and the claim is pending.

[1] Hadaller intended to Cite Strong in his opening brief instead of the inadvertent error citing an unreported case which cited to Strong. Strong was cited in the ttrial court Response to Summary Judgment.(CP187 L. 21)

The Complaint did notice the Lowes of Hadaller's claim

of misrepresentation (CP3)(CP 17 ¶4.1) (CP 20 ¶5.1) (CP 13 ¶ 3.36), (CP14 ¶ 3.38 & 3.39) (CP 16 ¶ 3.51, ¶3.52) (CP188)

Pleading requirements are liberally construed . "[I]nitial pleadings which may be unclear may be clarified during the course of summary judgment proceedings.". (CP 203,204) *Adams v. King County,* 164 Wash. 2d 640 @ 658, 192 P.3d 891, 900 (2008) CR 8(a)(1) All allegations of fact which are well pleaded, together with reasonable inferences therefrom, are admitted by demurrer, and are to be liberally construed with view to substantial justice between the parties. *Wilkinson v. City of Tacoma*, 39 Wash. 2d 878, 239 P.2d 344 (1952) A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests *Evergreen Moneysource Mortg. Co. v. Shannon,* 274 P.3d 375 (Wash. Ct. App. 2012), reconsideration denied (May 3, 2012) The complaint and response to summary judgment gave the Court and the Lowes more than fair notice of Hadaller's claims of misrepresentation. The Lowes defended against their misrepresentation. (CP 727 L.1 & 638 ¶4.1)

Reply to Lowe's Interference:

Whether a party has acted in bad faith or dishonestly for purposes of a tortious interference with contract claim will generally be an

issue of fact .*Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wash. App. 500, 31 P.3d 698 (2001)Substantial evidence supports the conclusion that the Lowe's intentionally interfered with Hadaller's business expectancy for an improper purpose by *Westmark Dev. Corp. v. City of Burien,* 140 Wash. App. 540, @ 558, 166 P.3d 813,@ 822 (2007)

The First Right of Refusal Has Standing: The Lowes error in their contention that Mr. Fortman, who had obtained $250,000 cash from the Lowes in 2008 [2] and is answering a claim of unjust enrichment and misrepresentation, words are from a "disinterested party". Fortman's declaration conflicts with the real estate broker who listed and sold Fortman's lots 1and 3 and personally negotiated the first right of refusal with Fortman and Hadaller. It is material to note Robert Kling (Kling) had received his compensation from Mr. Fortman years prior and holds no financial or legal repercussion interest at this point, unlike the Fortman's. Kling drafted a document that was intended to memorialize a first right of refusal but as it went along it morphed into a plan to enter into a lease/option agreement for lot 2. (CP 173) That document succeeded the integration clause within the purchase and sale

[2] ($110,000 more than Fortman's 2005 agreement with Hadaller which caused him to borrow $310,000 partially to build a road and utilities to supply up to twelve lots on lot 2 besides the four contemplated on lot 3)

agreement, it then left the negotiations open that took place with the realtor. CP (171) Also, from 2002 -2006 Mr. Fortman repeatedly acknowledged Hadaller's right to match any offer and continued that promise which Hadaller relied upon in developing his lot 3 and built the road to serve lots 2 and 3 under that ongoing promise. (CP 122,123) (CP104-112) More relevant here than the *M.A.Mortinson Co v. Timberline Software Corp.,* 140 Wn. 2d 568 case cited by Lowe, is a more similar case, holding:

> Viewing the evidence in the light most favorable to Mr. Flower, there is, at a minimum, a question of fact as to whether the parties intended the May 13 acknowledgement to be a final expression of a fully integrated agreement. In fact, there is evidence to suggest that the June 4 terms of employment agreement was the final agreement between the parties and the express at-will agreement was eliminated by merger into the final terms of employment agreement that contained no reference to the express at-will agreement. *See Black v. Evergreen Land Developers, Inc.,* 75 Wash.2d 241, 248, 450 P.2d 470 (1969). The question of whether a merger of oral and written terms occurred is a question for the trier of fact. *Ban–Co Inv. Co. v. Loveless,* 22 Wash.App. 122, 587 P.2d 567 (1978); *Olsen Media v. Energy Sciences, Inc.,* 32 Wash.App. 579, 584, 648 P.2d 493 (1982). Citing: *Flower v. T.R.A. Indus., Inc.*, 127 Wash. App. 13, @30, 111 P.3d 1192, @1201 (2005)
>
> Integration clause providing that written documents constitute parties' entire agreement strongly supports conclusion that parties' agreement was fully integrated, and if such is the case, parol evidence is inadmissible; however, parol evidence of prior or contemporaneous oral agreements is not necessarily excluded by such clauses, and determination whether merger or oral and written terms occurred is question for trier of fact. *Olsen Media v. Energy Sciences, Inc.*, 32 Wash. App. 579, 648 P.2d 493 (1982)

The integration clause was succeeded and left open by the January 2, 2002 Addendum written agreement of the purchase and

sale agreement and its provisions are a material issue of fact to be heard by a jury. (169-173) (CP751-756)

The Trial Court did not find Hadaller had presented no evidence that he and Fortman had a first right of refusal in Case No. 09-2-00934. That case did not pertain to the Fortman's and no evidence was relevant or admitted regarding this issue in that suit, nor would such a finding be appropriate. (Canon 2.10)

Whether Fortman offered the sale of lot 2 to a third party, for $150,000 has no bearing unless a sale evolved, the Greer's merely told Hadaller of the offer disclosing Fortman's much increased price expectancy from his 2002 agreement. (CP 105,106)

Another Lowe obfuscation correction is, Hadaller did not state Randy Fuchs attempt to buy lot 2 destroyed the first right of refusal contract. Hadaller asserts Fuchs attempted purchase ruined Fortman's and Hadaller's working relationship, which was competitive, but a working one before Fuchs waved $200,000 under Fortman's nose attempting to buy lot 2 with the improvements Hadaller had placed on it. Hadaller asserts too much performance had occurred to destroy the commitment the Fortman's were obligated to perform. (CP108¶14 -112¶31)

Hadaller's statement (CP570¶2.12) is not an admission that no first right of refusal agreement existed, it is a statement of when

Fortman first indicated a change of mind about the first right of refusal, his previous actions and Hadaller's performance according to Fortman's previous statements prevents Fortman from reneging once Hadaller had improved the property and it was able to obtain the much increased price. *McCormick v. Lake Washington Sch. Dist.*, 99 Wash. App. 107, @ 111, 992 P.2d 511, @ 513 (1999)

The fact Fortman refused Hadaller's multiple offers to buy lot 2 does not end his obligation under his first right of refusal to allow Hadaller to match any other offer Fortman decided to sell the property for. A right of first refusal has no binding effect unless the offeror decides to sell, at such time it then legally constrains the owner. *Manufactured Hous. Communities of Washington v. State*, 142 Wash. 2d 347, @ 364, 13 P.3d 183, @191-92 (2000)

Lowe's argues that Kling's testimony (CP 753,754) states a lease agreement was not signed, which was a lease agreement that is not material to this issue. Kling's statements made on the stand (CP 757-764) in case No. 09-02-00934-0 merely introduces the testimony that is relevant in this suit, it was not relevant in that suit, no findings could be concluded by the statements. Kling will testify and Fortman is bound by his previous deposition statement to testify, that an agreement of a first right of refusal was agreed to as a condition for Hadaller to purchase lots 1 and 3 instead of lot 2 and 3.. *McCormick I.d* @111_ (CP122,123)

That ongoing agreement which Hadaller performed in reliance of, legally exists. A dispute exists with respect to the terms of the oral contract, summary judgment is not appropriate. Instead the finder of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement. *Duckworth v. Langland* 95 Wn. App 1 @6-7, 988 P.2d 967 1998)

Hadaller did make valuable improvements, the road and utilities Hadaller built across lot 2 at his expense was built to accommodate up to twelve residences on lot 2.(CP 513¶15-31) (CP 548 ¶ 7,8) That was an extra expense that was not required to develop lot 3 alone into only four lots, contrary to Lowes argument, and was done by Fortman/ Hadaller's 2005 agreement Hadaller was going to own it. The Court should not look to Jennings, 25 Wn. 2d, Jennings is a case regarding a will having the element of deadman statute to contend with. More relevant cases were cited, in the opening brief, that all agree the evidence, to prove an interest in land from, must be "clear and convincing, i.e. admitted" (CP 122 L.22) *Berg v. Ting* 68 Wa. App. 721@732, 850 P.2d 1349 (193) that evidence must be taken in a trial setting, for the finder of fact to weigh all evidence" *Garbell v. Tall's Travel Shop, Inc.*, 17 Wash. App. 352, @ 355, 563 P.2d 211, 212 (1977)

The Lowes diverted a claim of breach against the Fortman's, by their pretended agreement with Hadaller when they bought lot

2. Hadaller was aware the Lowes were purchasing and was justified in expecting the Lowes were going to complete their original proposal. That would have resolved the ongoing easement problems in the development by entering into the arrangement discussed (CP 134-137) and hand drafted and presented to the Lowes on May 8, 2008 . That was to end the ongoing legal dispute regarding the easements with close to what his net return would have been had he paid the very high price Fortman had been conditioned to obtain by Fuchs. Accordingly, Hadaller's legal remedy, as far as the termination of that contract, now is against the Lowes and these claims for misrepresentation and interference.

Alternately and also, Courts have held that even when a contract is not enforceable on its face between the parties, Hadaller and Fortman, it may support a tort claim for interference. See *Young v. Pottinger*, 340 So. 2d 518 @ 520 (Fla. Dist. Ct. App. 1976)

Nature of tort of interference with an advantageous relationship does not vary with the legal strength or enforceability of the relation disrupted; the actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable. *Buckaloo v. Johnson,* 14 Cal. 3d 815, 537 P.2d 865 (1975)

Lowes argue that they were not noticed of the contract by the lis pendens,(CP 501-503) and Lowe's involvement as a party in suit No. 06-2-01146-3 and Hadaller's declaration supporting his answer to the Fortman's counterclaims filed before Lowe became a party,(CP146 - 160) and the discussions the Lowes had with Hadaller (CP113 ¶35) and Deborah Reynolds (CP 176 ¶6) amounts to a notice that Hadaller relied upon his first right of refusal to protect his investment into lot 2. Granting relief to their argument would defeat the very purpose of a lis pendens. *Merrick v. Pattison,* 85 Wash. 240 @ 245, 147 P. 1137 (1915);) The Lowes are legally deemed to know of the first right of refusal. Interference with a business expectancy is intentional where either the actor actually desired to bring about the interference, or the actor knew that interference is certain or substantially certain to occur as a result of his or her actions. *Newton Ins. Agency v. Caledonian Ins. Group, Inc.,* 114 Wn.App. 151, 158, 52 P .3d 30 (2002). Finder of fact in a trial setting should be the one to decide which declaration is more believable. Restatement (Second) of Torts § 767 (1979)

Lowes implied "innocent intent" is controlled by improper method/means of purchasing lot 2. The Trial Court erred in granting summary judgment considering the issue of material facts. *Klinke v. Famous Recipe Fried Chicken, Inc., I.d.* @ 256-57

The Lowes response states that they simply innocently bought

and Fortman innocently sold lot 2, Hadaller was aware of that sale and made no effort to enjoin, nor sue Fortman for breach so it is all O.K. That sounds easy on its face and would carry the day had the Lowes completed or even attempted to complete the plan they made with Hadaller. Uncontroverted testimony shows Lowe's plan proved (CP115¶38- CP 117 ¶47) as time passed, to keep Hadaller quiet while they furthered their plan of taking control of the homeowners association, rearranging easements and suing him, in a cloak of the Homeowners association, for resisting their diabolical plan instead of completing the agreement they began in order to get Hadaller to work with them before they bought the lot. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wash. App. 229, @ 262, 215 P.3d 990, 1008 (2009) CR 15(a) *Walla v. Johnson*, 50 Wash. App. 879 @ 882, 751 P.2d 334 @ 336 (1988)

Legal Rescission of that sale is proper to allow Hadaller an opportunity to prove and enforce his first right of refusal. If the promise is made for the purpose of inducing a party to enter into an agreement which he would not otherwise enter into, and with a present intent on the part of the person making the promise not to perform, it is a fraud on which an action can be predicated. *Jacquot v. Farmers' Straw Gas Producer Co.*, 140 Wash. 482, 486-87, 249 P. 984, 986 (1926) The damages given under Restatement (Second) of Torts § 552C (1977) are restitutionary in nature. In the

traditional restitution action, the plaintiff returns what he has received in the transaction, and recovers what he has parted with, so that he is in effect restored to the pecuniary position in which he stood before the transaction. *Hoffman v. Connall*, 108 Wash. 2d 69 @ 78, 736 P.2d 242 @ 246 (1987)

The analysis of intent regarding Fortman as a disinterested third party begins in the Lowe/ Fortman purchase Agreement whi*ch colludes:*

"(a) Upon request of Seller, [Fortman] Buyers [Lowe] shall timely and effectively cast their votes (or give Seller their legal and binding proxy to cast all votes that they have by virtue of their ownership of lots within Mayfield Cove Estates) to annex the Property into Mayfield Cove Estates as described in .." [3].(CP 488 ¶7)

The Lowes also are asking this Court to make a summary decision that it believes Hadaller would simply tell the Lowes that he did not care who were the beneficiaries of the over $300,000 unrecovered expenses Hadaller had invested into the plats, he previously pled, in Fortman case with Lowe as party, he expected to recoup from buying lot 2 and selling the lots Hadaller had placed the infrastructure for on the lot. That in comparison with the pleading in the case with the Fortman's over easement description disputes (CP146 – 160) a year before the Lowes bought lot two

[3] Hadaller had an attorney draft an amendment, had it executed and recorded stating only Hadaller could add additional properties, the Lowes and Fuchs colluded with fraud and perjury to invalidate that to allow, Lowe to succeed at obtaining an easement for twelve homes.

stating Hadaller's claim to recover his investment. The Lowes expect the Court to hold that it understands that a man would all of a sudden give his entire life's financial accomplishments and simply not be concerned, until all of a sudden two years 364 days later decide to file a complaint over the subject. In the interim of that time Hadaller was within his rights to expect the document an attorney drafted for him to protect Hadaller's investment, the 2006 Amended Covenant Document, under appeal, would make the Lowes come to realize they had to be fair with Hadaller..

Every contract carries with it an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of performance.", *aff'd sub nom. Ross v. Kirner,* 162 Wash.2d 493, 172 P.3d 701 (2007). Citing Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wash. App. 229, @ 265, 215 P.3d 990, 1009 (2009)

Discovery, which has not occurred because Lowes filed for summary judgment very shortly after their answer, will materially link Lowe and Fuchs before the Lowes bought their lots from Hadaller in 2007 proving they colluded in fraud and perjury (CP 255 – 360,) CP 262 -276) (CP 361-367) to invalidate that document. The interference was still a factor and the Fortman case, where it is most relevant in, was the case where it should have been allowed to be joined into when Hadaller moved for joinder in December 2010.The element of intent manifested contemporaneous with the element of " by improper method",

when Hadaller finally realized the Lowes had boldly used the provisions of Hadaller's CCR's and recording the easement and suing Hadaller to displace him as the developer of Mayfield Cove Estates on December 30, 2008. At that time the elements of misrepresentation had manifested which supports the element of improper method of ending the expectancy of Hadaller of the Fortman first right of refusal and satisfies the element of intent, by its issue of material fact regarding the elements of the misrepresentation needed to be shown.

Lowes argument of the undisputed fact Hadaller allowed the sale is based on the fact Hadaller understood Fortman's position he was angry he wasn't able to sell to Fuchs and profit from Hadaller's work on lot 2 and unjustly place Hadaller's earnings in his pocket at that time. Hadaller expected he could enforce the first right of refusal but it was obvious it would be a legal battle. Hadaller side stepped that legal battle expecting a "sure thing " with the Lowes and a means of obtaining immediate peace in the neighborhood on all the easements[4] that were subject of the Fortman suit.

Barten v. Dahmen, 5 Wn. App. 135, 486 P.2d 295 (1971) is

[4] A bird in the hand is worth two in the bush theory, a claim for Unjust enrichment and misrepresentation is pending against Fortman in case No. 06-2-01146-3 and joinder (if they are not already a party, the trial court states they are or are not at convenience) of the Lowes for trespass regarding his latest easement filing across Hadaller's lake front in January 2012, awaiting the outcome of this review

an overly simplistic analysis of tortuous interference, The Courts have quoted much more in depth cases on this issue when it held a cause of action for tortious interference arises from the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships. *Top Serv.,* 582 P.2d at 1368. A claim for tortious interference is established when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means.... No question of privilege arises unless the interference would be wrongful but for the privilege ... Even a recognized privilege [however] may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege.... *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365 (1978) Interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a "duty of non-interference; *i.e.,* that he interfered for an improper purpose ... or ... **used improper means** ..." *Straube v. Larson,* 287 Or. 357, 361, 600 P.2d 371 (1979). Citing: *Pleas v. City of Seattle*, 112 Wash. 2d 794, @ 803-04, 774 P.2d 1158, 1163 (1989)

Accordingly the Courts hold that even when defendant's objectives are not improper, for instance the pursuit of competition or other legitimate interests, defendant may still be liable for using improper means to achieve these objectives. *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, *I.d.* @209

Pleas is more appropriate than *Barton* in this case because in

Pleas, the Court went into great depth to analyze each element of interference for future citation, particularly more relevant in analyzing the element of improper method used. It is probably the most cited Washington case to date on the subject. In *Pleas* the set of facts were that a developer had applied for a permit to build an apartment complex in a neighborhood zoned allowing for that. A local citizens group formed and opposed the complex to the city council, who rapidly forced a rezone preventing issuance of the permit. The rezone was found to be arbitrary and capricious by the Trial Court who found interference because it concluded, although the City had regular authority to rezone, the Trial Court held city officials improperly did so in that case, arbitrarily, to please the voters to gain political benefits by preventing the permit for the apartment complex. Upon appeal the, Division One Appellate Court reversed, holding the City possesses a right to rezone and did so as regular business, alas, no improper method was used to support interference. Review by the Supreme Court was granted

and the Supreme Court made the detailed analysis which reversed the Appellate Court and upheld the Trial Court decision, again holding the city officials used improper methods of arbitrarily rezoning to obtain political favor. Accordingly, the Courts have held to that stating when a third party uses improper means, specifically citing fraudulent misrepresentation as an element, any innocent intent priviledge, in this case the Lowes claim of the right to merely buy a property from Fortman, disappears and the actor (Lowe) must answer for his improper method which becomes interference once the misrepresentation is proven in a trial setting. *Preston I.d.* @ 682, Those Courts based their decision on the fundamental premise of the tort-that a person has a right to pursue his valid contractual and business expectancies unmolested by the wrongful and officious intermeddling of a third party-has been crystallized and defined in Restatement, Torts s 766 *Calbom v. Knudtzon*, 65 Wash. 2d 157 @162, 396 P.2d 148, 151 (1964)

Lowes argument based upon an agreement to agree is misplaced. Hadaller is not suing the Lowes in contract nor attempting to have the courts enforce one, so much as he is attempting to negate Lowes wrongful misrepresentation to provide rescission so Hadaller has the opportunity to buy back lot 2 and the improvements he paid for on it, instead. Which is the point that makes this case so important to be joined with Case No 06-2-

01146-3 to have the Fortman's and Lowes together in one case where a contract (first right of refusal) could be constructed with the Fortman's at the same time as the jury considers the elements of interference against the Lowes. The virtue of judicial economy entailed in joinder outweighs the Fortman's and Lowes desires to be tried separate avoiding re-litigating several common facts supporting each claim. The Fortman case should be consolidated with this case and a jury trial be provided[5]. *Haner v. Quincy Farm Chemicals, Inc.*, 97 Wash. 2d 753 @ 759, 649 P.2d 828 @ 831 (1982) CR 18 (a), 19(a), 15(a)

Lowes argument of Damages, to Hadaller, resulting from Lowes improper interference and misrepresentation also attempts to obfuscate the facts. Applying the present set of facts to *Fischnaller* is significantly different that the Lowes argue. First, *Fischnaller* was not decided at summary judgment and the facts here must be concluded as if Hadaller's are true. When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party *Ranger Ins. Co. v. Pierce County,* 164 Wash. 2d 545, @ 552, 192 P.3d 886, 889 (2008) Secondly, the Courts found *Fischnaller* and or his tenants did not timely have the funds required to exercise the lease. Hadaller , and D & R did have the funds to buy lot 2 in 2006 and

[5] Hadaller ignorantly allowed his right to jury slip by him in the Fortman case, but has a right for jury in this case.

Fortman allowed the $201,000 offer to expire for a week before Hadaller replaced it with one more in line to Fortman's previous commitments Hadaller agreed to take the project on under. (CP 104 ¶1-CP107 ¶9) (CP 108 ¶14- CP 112 ¶31)(CP 113 ¶33(a)) (CP 210- 217) Hadaller was and continued to be in a position to match any offer Fortman could receive for lot 2. The three possible lake front lots are/were valued at approximately $200,000 in 2007 ($150,00 - $175,000 today) and the back lots were worth $70, 000 ($50,000 – $65,000 today) (Hadaller was restricted to eight lots total by water law) Hadaller was expecting a gross return of an estimated $750,000 from the lots he placed the infrastructure for and the Lowes currently have the benefit of by their misrepresentation. Had Hadaller granted the lake front lots to D&R as planned he would have realized a net profit from the back lots. Instead Hadaller obtained substantial law suits from the hands of Lowe costing him substantial damages from the judgments, which were systematically designed as held in *Deep Water I.d.* @ 265 and . *Ross v. Kirner.*

Reply to Recusal of Judge Lawler The Lowes have obfuscated the facts and their argument. The Lowes were not represented by any of Judge Lawler's firm. It is Fortman who was and avoided many issues by Judge Lawler granting summary judgment, see opening brief.

Fuchs signed the amended covenants then lied under oath. (CP255-360)(CP841) The Court made a clear, but bias opinion indicating the sworn oath has no effect.(CP 351)[6] No appeal.

Attorney Fees The claims made are not frivolous, nor lack merit. They are supported by substantial fact the argument in the Response (CP 206-208) and opening brief are made in opposition.

CONCLUSION

The Lowes Respondent' Brief fails to negate the clear showing of genuine issue of material fact demonstrated by Hadaller's response to the summary judgment motion, the opening and reply briefs. The Court should reverse the order granting Lowes summary judgment and remand this matter to trial with the Lowes and Fortman's in the same suit.

Respectfully submitted by

On June 26, 2012 John J. Hadaller / Appellant

[6] Hadaller filed the complaint under duress of trial his reading of the law led him to understand that if he could clearly show Fuchs' testimony was in bad faith Fuchs lost his privilege to lie. Upon responding to summary judgment Hadaller realized Fuchs had a legal right to lie without the claim of slander effecting him. Hadaller moved to amend the complaint at the summary judgment to file claims that are more applicable. He was denied and did not appeal because of the showing required of abuse of discretion and the history of failure of such an appeal, and secondly because of page limit and amount of response necessary to Lowes claims. Hadaller desires the decision to be reversed.

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

JOHN J. HADALLER An individual, Plaintiff	) COA No. 42524-6-II) LCSC No. 11-2-00574-5
v.	) DECLARATION OF SERVICE
DAVID A.and SHERRY LOWE,individually) and the Marital community thereof; and RANDY FUCHS, An individual; Defendants	)

Deborah J. Reynolds, Declares as follows, That I am now and at all times here-in mentioned , was a citizen of the United States of America and a resident of the state of Washington, over the age of eighteen (18) years, and not a party to the above action and competent to be a witness therein.

That on the 27th day of June 2012. I served the following documents :

- *DECLARATION OF SERVICE*

- *APPELLANTS REPLY BRIEF*

On the following, by this method:

[ ]Personal Service;

[ ]facsimile

[X] U. S. Mail

[ ]e-mail

To the following:

David A. Lowe
701 Fifth Ave. Suite 4800
Seattle, Wa. 98104
(206) 381-3303
lowe@blacklaw.com
(206) 381 – 3301 fax

The fore-going statements are made under penalty of perjury under the laws of the state of Washington and are true and correct.

Signed at Mossyrock, Washington on the 27th day of June 2012.

Deborah J. Reynolds